Cite as 2009 Ark. 477

SUPREME COURT OF ARKANSAS

No. CR09-321

DAVID CRAIG WHITHAM,
APPELLANT,

VS.

STATE OF ARKANSAS,
APPELLEE,

Opinion Delivered October 8, 2009

APPEAL FROM THE FAULKNER COUNTY CIRCUIT COURT,
NO. CR07-2285,
HON. DAVID LEE REYNOLDS, JUDGE,

AFFIRMED.

JIM HANNAH, Chief Justice

David Craig Whitham appeals his conviction for rape and sentence of life imprisonment. He raises two issues on appeal. We affirm the conviction and sentence. Our jurisdiction is pursuant to Arkansas Supreme Court Rule 1-2(a)(2).

Whitham was accused of committing rape by engaging in sexual intercourse or deviate sexual activity with another person who is less than fourteen years of age. He does not challenge the sufficiency of the evidence on appeal; therefore, a recitation of the facts is unnecessary. Whitham challenges admission of testimony by persons who alleged they were sexually abused by him in the past and a letter written by Whitham to his wife.

I. *Admission of Testimony of Prior Victims*

Whitham argues that the circuit court erred in admitting testimony from S.C. and B.E. that Whitham sexually abused them when they were children. S.C. testified to abuse

occurring in about 1980 and continuing for some undefined time thereafter. B.E. testified to abuse that occurred between about 1978 and 1985. Whitham moved in limine to exclude the testimony of S.C. and B.E., arguing that too much time had passed and that he was a minor at the time of the alleged abuse. Whitham turned eighteen in August 1984. Whitham also argued that the witnesses' "veracity" was in question because of the passage of time, and that the evidence should be excluded under Arkansas Rule of Evidence 404(b) and Arkansas Rule of Evidence 403. The motion was denied. On appeal, Whitham cites this court to *Eubanks v. State*, 2009 Ark. 170, ___ S.W.3d ___, noting that it concerned admission of evidence of similar acts under Rule 404(b). Whitham does not develop an argument on whether the acts testified to by S.C. and B.E. are similar to those alleged in the present case; however, even if he had developed an argument, this issue was not raised and decided in the circuit court and will not be heard for the first time on appeal.[1] *See Robertson v. State*, 2009 Ark. 430, at 13, ___ S.W.3d ___, ___.

Whitham also asserts on appeal that the passage of time is so great that the accuracy of the memory of the accusers is called into question, and that his memory is impaired by time, preventing him from responding to the allegations. Whitham, citing Rule 403, finally asserts that the prejudice was so great he was denied the right to a fair trial.

We note first that Whitham's argument on why the testimony should be excluded is unclear. If he relies on *Eubanks* to argue that the testimony should be excluded based on

[1] We note that Whitham did not abstract the victim's testimony. Therefore, a comparison of the similarities in the acts would have been impossible.

passage of time, then reliance on *Eubanks* is in error. Our opinion in *Eubanks* does not discuss the effect of the passage of time on the admission of evidence under Rule 404(b).[2] Thus, it provides no insight into Whitham's argument on that issue.

Whitham also cites Rule 403. He asserts that the testimony was more prejudicial than probative but fails to develop an argument. This court has made it clear that it will not consider an argument, even a constitutional one, if the appellant makes no convincing argument or cites no authority to support it, and it is not apparent without further research that the appellant's argument is well taken. *White v. State*, 367 Ark. 595, 611, 242 S.W.3d 240, 252 (2006). Thus, we do not address Whitham's argument that the circuit court erred in admitting S.C. and B.E.'s testimony.

. II. *Photocopy of the Letter*

Whitham also asserts that the circuit court erred in admitting a copy of a letter written by him to his wife Loretta Whitham while they were both in jail.[3] Whitham wrote a letter to Loretta in pencil. The letter was delivered to Loretta by authorities within the jail. Loretta received the letter, read it, and decided that a copy should be forwarded to the Arkansas Department of Human Services. She requested that the jail make a copy. Detention officer Mary McCardo made the copy and returned the original to Loretta pursuant to procedure;

[2] A discussion of the issue of remoteness in time and admission of evidence under Arkansas Rule of Evidence 404(b) is found in our precedent. *See, e.g.*, *Flanery v. State*, 362 Ark. 311, 208 S.W.3d 187 (2005).

[3] Whitham's wife Loretta Whitham was charged with crimes arising from the same events.

however, in copying the letter, McCardo noticed language in the letter that might be of interest to the state and informed her superior. She was instructed to copy future correspondence but was not instructed to reacquire the original of the letter at issue.

At trial, the State introduced a copy. Whitham argues the copy was not accurate. He states that, while he wrote the phrase, "(I Didn't Do it)," part of his letter was erased, altered, and then copied so that the copy read, "(I Did Do It)." The parenthetical is in a sentence, and Whitham alleges the original letter was written as follows: "So what did you tell that cop the day we got arrested? I didn't tell her much except (I Didn't Do It) and she said you started to talk."

Loretta testified that after she read the letter, she had it put in her property bag at the jail, and that when she was transferred, she gave family and others permission to pick up her property. She did not know where the original might be. Loretta was asked if the copy introduced at trial was the same as the original, and specifically whether the original stated, "(I Didn't Do It)." Loretta testified that Whitham did not write "(I Didn't Do It)" in the original letter, but rather the copy that has "(I Did Do It)" was correct. Loretta testified that, just as the copy, the original letter stated, "I Did Do it."

Whitman argues on appeal that the circuit court erred in ruling that the original was not in the custody of the State and in admitting the photocopy. We are cited to *Eastlin v. State*, 370 Ark. 10, 257 S.W.3d 58 (2007), *Hamm v. State*, 296 Ark. 385, 757 S.W.2d 932 (1988), and *Sumlin v. State*, 266 Ark. 709, 587 S.W.2d 571 (1970), for the proposition that

the original letter had to be produced. These cases concern admission of written transcripts of statements where a recorded statement was not available to compare and determine whether the written transcript accurately recorded what was said. They are not on point.[4]

Arkansas Rule of Evidence 1003 declares a duplicate to be admissible to the same extent as the original unless a genuine question is raised to authenticity or where it would be otherwise unfair to admit the duplicate. The party that alleges alteration bears the burden of proving that there is a genuine question of authenticity. *United States v. An-Lo*, 851 F.2d 547, 557 (2nd Cir. 1988). Whitham asserts the copy is an altered form of the letter containing an admission of his guilt when the original contained a denial of his guilt. As with the admission of evidence generally, admission of a duplicate under Rule 1003 is reviewed under an abuse of discretion. *Sera v. State*, 341 Ark. 415, 447, 17 S.W.3d 61, 81 (2000). Whitham alleged the letter was altered, whereas Loretta testified that the photocopy introduced was accurate. Issues of credibility are for the trier of fact, in this instance the circuit court because the question of credibility bore on admission of evidence. *See Stokes v. State,* 375 Ark. 394, 398, ___ S.W.3d ___, ___ (2009). Whitham did not bear his burden of proof in showing that there was a genuine question of authenticity. We find no abuse of discretion in the admission of the copy.

III. *4-3(i)*

[4] In the case of excluded written transcripts of recorded statements, oral testimony of the confession is still allowed. *Hamm v. State*, 296 Ark. 385, 389, 757 S.W.2d 932, 934 (1988). In the present case, Loretta could in any event have been asked to testify that Whitham's letter contained the admission, "I Did Do It."

Pursuant to Arkansas Supreme Court Rule 4-3(i), this court has reviewed the abstract, addendum, and record for all adverse rulings on objections, motions, and requests made by either party. No reversible error has been found.

Affirmed.